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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAILROAD COMMISSION OF TEXAS, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Courts of Appeals are in conflict regarding preemption of State railroad walkway requirements pursuant to the Federal Railroad Safety Act of 1970, 45 U.S.C. § 431 *et seq.*

2. Whether the Fifth Circuit's decision herein improperly places national uniformity of regulation over the primary goal of safety under the Federal Railroad Safety Act of 1970, resulting in a void or gap in safety regulation which cannot be filled by the State.

LIST OF ALL PARTIES

The following parties appeared before the Court of Appeals:

Plaintiff-Appellees:

Missouri Pacific Railroad Company,
Southern Pacific Transportation Company,
The Atchison, Topeka and Santa Fe Railway Company,
Burlington Northern Railroad Company,
Missouri-Kansas-Texas Railroad Company,
St. Louis-Southwestern Railway Company,
Kansas City Southern Railway Company,
Louisiana and Arkansas Railway Company.

Defendant-Appellants:

Railroad Commission of Texas, and its Commissioners:
Lena Guerrero
James E. (Jim) Nugent
Robert Krueger

TABLE OF CONTENTS

Page

OPINIONS BELOW 2
JURISDICTION 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 2
Statement of Facts 3
REASONS FOR GRANTING THE PETITION 4

I. THE CIRCUIT COURTS ARE IN CONFLICT CONCERNING PREEMPTION OF STATE WALKWAY REQUIREMENT . . . 4
A. The Issue - Walkways along railroad tracks 4
B. The Ninth Circuit Decision 6
C. The Fifth Circuit Decision 6
D. The Sixth Circuit Decision 7

II. THE HISTORY OF SECTION 434 OF THE FEDERAL RAILROAD SAFETY ACT ESTABLISHES CONGRESS'S INTENT TO CREATE A PARTNERSHIP BETWEEN FEDERAL AND STATE LAWMAKERS, IN THE PURSUIT OF RAIL SAFETY. 8
A. Congress Intended That States Have Authority To Regulate Railroad Safety Subsequent To The Passage Of The FRSA. 9
B. The Primary Purpose Of The FRSA Is to Promote Safety In All Areas Of Railroad Operations. 14

III. THE NINTH AND FIFTH CIRCUITS HAVE RENDERED DECISIONS WHICH ESTABLISH CONFLICTING APPROACHES TO THE APPLICATION AND INTERPRETATION OF § 434 OF THE FRSA. 17

A. The Ninth Circuit Has Concluded That State and Federal Regulations Cannot be Held to Cover the Same Subject Matter Unless They Address the Same Safety Concerns. 17

B. The Fifth Circuit has Concluded That If A State Regulation Has the Effect Of Regulating A Subject Matter Which "Functionally Overlaps" A Subject Matter Covered By FRA Regulations, The State Regulation Does Not Foster National Rail Safety Standards To The Extent Practicable And Is Preempted. 19

C. The Fifth Circuit Interpretation of § 434 Directly Contradicts Congressional Intent And The Plain Meaning Of That Section. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Black v. Baltimore & Ohio R.R., *398 N.E.2d 1361 (Ind.Ct.App.. 1980)* 9

Black v. Seaboard System R.R., *487 N.E.2d 468 (Ind.Ct.App. 1986)* 9

Chevron U.S.A., Inc. v. Hammond, *726 F.2d 483 (9th Cir. 1984), cert. denied, 105 S.Ct. 1686 (1985)* 15

Chrysler Corp. v. Tofany, *419 F.2d 499 (2d Cir. 1969)* 15

Chrysler Corp. v. Rhodes, *416 F.2d 319 (1st Cir. 1969)* 15

Donelon v. New Orleans Terminal Co., *474 F.2d 1108 (5th Cir. 1973), cert. denied, 414 U.S. 855 (1973)* 17,21

Florida Lime & Avocado Growers v. Paul, *373 U.S. 132 (1963)* 16,20

Hillsborough County, Florida v. Auto Med. Labs, 471 U.S. 707, 105 S.Ct. 2371 (1985) 15

Illinois Cent. Gulf R.R. v. Tennessee Pub. Serv. Comm'n., *736 S.W.2d 112 (Tenn.Ct.App. 1987)* 9

Kelly v. Washington, 302 U.S. 1 (1937) 15

Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983) 5

Missouri Pacific Railroad Co. v. Railroad Commission, 833 F.2d 570 (5th Cir. 1987) . . . . . passim

Missouri Pacific Railroad Co. v. Railroad Commission of Texas, 948 F.2d 179 (5th Cir. 1991) 7,20

Napier v. Atlantic Coast Line R.R. Co.,
272 U.S. 605 (1926) 9
National Association of Regulatory Commissioners v. Coleman, 542
F.2d 11 (3rd Cir. 1976) 19
New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973) 15,16
Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission,
413 A.2d 1037 (Penn. 1980) 5
Norfolk & Western Railway v. Public Utilities Commission of Ohio
727 F.Supp. 367 (S.D. Ohio 1990)
aff'd., 926 F.2d 567 (6th Cir. 1991) 7,9
Pacific Gas and Electric v. State Energy Resources Conservation and Development Commission, 416 U.S. 190 (1983) 15
Schwartz v. Texas,
344 U.S. 199 (1952) 15
Southern Pacific Transp. v. Public Utilities Comm'n, 647 F.Supp. 1220
(N.D. Cal. 1986), aff'd., 820 F.2d 1111
(9th Cir. 1987)(per curiam) . . . . . passim

Statutes:

28 U.S.C. § 1254(1) 2
45 U.S.C. § 434 . . . . . passim
45 U.S.C. § 421 4
TEX. REV. CIV. STAT. ANN. art. 6448a
(Vernon Supp. 1991) 3

Miscellaneous:

49 C.F.R. § 213.37 (1985) 19
16 TEX. ADMIN. CODE § 5.619 2,4
Federal Railroad Safety Act of 1970 2
Hearings Before the House Committee on
Interstate and Foreign Commerce
on H.R. 16980, 90th Cong. 2d Sess.
1-6, Ser. No. 90-39 (1968) 10
Hearings Before the Subcomm. on Transp.
and Aeronautics of the Comm. on
Interstate and Foreign Commerce
on H.R. 7068, H.R. 11417, and
H.R. 14478 (and similar bills)
S. 1933, 91st Cong., 2d Sess.,
Ser. No. 91-51, p. 29 (1970) 12
116 Cong. Rec. 27613 (August 6, 1970) 13
Senate Report No. 91-619, 91st Cong.,
1st Sess. (1969) pp. 8-9 13,14
House Report No. 91-114, U.S. Code Cong.
and Admin. News, 91st Cong. (1970) 13,14

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TO THE HONORABLE SUPREME COURT:

Petitioners, Railroad Commission of Texas and its Commissioners Lena Guerrero, James E. (Jim) Nugent, and Robert Krueger, appearing by and through Dan Morales, Attorney General of Texas, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued December 6, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) is reported at 948 F.2d 179 (1991). The opinion of the United States District Court for the Western District of Texas, Austin Division (Appendix C) is unreported. The first opinion of the Fifth Circuit, prior to remand, (Appendix E) is reported at 833 F.2d 570 (1987).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The Judgment of the court of appeals was entered on December 6, 1991.

STATUTES INVOLVED

The pertinent provision of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 is set forth in the Reasons For Granting The Petition. The Railroad Commission of Texas regulation, 16 Tex. Admin. Code § 5.619, is set forth in Appendix H.

STATEMENT OF THE CASE

The railroads originally brought this action against the Railroad Commission of Texas (the "Commission") seeking to enjoin and have held invalid a series of rail safety regulations promulgated by the Commission. The railroads complained that the state rules (1) were preempted by federal laws and regulations, (2) constituted an unconstitutional burden on interstate commerce, (3) were an unlawful exercise of power by the Commission, and (4) were arbitrary, capricious, and not supported by substantial evidence. The railroads moved for partial summary judgment on the grounds of preemption and unconstitutional burden. The Commission filed a cross

motion for summary judgment. The district court, by Amended Judgment and Memorandum Order, granted in part the railroads' motion for partial summary judgment and denied the Commission's motion solely on the ground of preemption by federal law and regulation. The Commission appealed.

The United States Court of Appeals for the Fifth Circuit affirmed in part, reversed in part, and remanded one issue for trial, finding a "material fact issue concerning the interrelationship between the state walkway requirement and federal track regulations." *Missouri Pacific Railroad Co. v. Railroad Commission*, 833 F.2d 570, 575 (5th Cir. 1987) (Appendix E) ("MOPAC I"). Accordingly, the case came before the district court on amended pleadings whereby the railroads complained only that the walkways regulation was (1) preempted, (2) an undue burden on interstate commerce, and (3) arbitrary, capricious and unsupported by substantial evidence.

The district court again ruled the State's walkway regulation preempted by federal law and regulations and dismissed as moot the railroads' remaining claims. The Fifth Circuit affirmed in the case at bar.

Statement of Facts

The Commission adopted the challenged regulation in 1986 in response to the 1985 enactment by the Texas Legislature of Tex.Rev.Civ.Stat.Ann. art 6448a (Vernon Supp. 1991), which provides:

> The Railroad Commission of Texas is hereby authorized to perform any act and issue any rules and orders as permitted by the Federal Railroad Safety Act of 1970 (45 U.S.C.A. 431, *et seq.*).

Upon proper public notice of rulemaking and receipt of public comments, the Commission promulgated the subject rail safety rule, codified at 16 Tex.Admin. Code § 5.619 (Appendix H).

Section 5.619 requires smooth, maintained, properly sloped walkways which are level with the tops of the ties along both sides of all tracks within railyards and the tracks adjacent thereto so as to provide safe areas for railroad employees to perform duties associated with those tracks.

REASONS FOR GRANTING THE PETITION

I.

THE CIRCUIT COURTS ARE IN CONFLICT CONCERNING PREEMPTION OF STATE WALKWAY REQUIREMENTS

The Fifth Circuit by its decisions in this case, has created a clear, direct conflict with the Ninth Circuit. In addition, the Sixth Circuit, in a closely related case, has reached a third resolution to the central issue. Intervention by this Honorable Court is required to end the confusion among the circuit courts.

A. The Issue - Walkways along railroad tracks.

The question, raised by railroads in each of the three jurisdictions mentioned, is whether state-enacted walkway requirements are preempted pursuant to the Federal Railroad Safety Act of 1970. 45 U.S.C. § 421 et. seq. ("FRSA"). That act provides, in part, that:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety *until such time as*

> *the Secretary has adopted* a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434. (Emphasis added).

Thus, the FRSA, should only preempt state laws or rules when the federal government has *acted* with respect to the same subject matter. It is undisputed in the case at bar that the FRSA does not occupy the entire field of railroad safety. *See also, Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983); *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 413 A.2d 1037, 1041 (Penn. 1980). Under FRSA § 434, two situations permit states to regulate. First, a state may regulate railroad safety until the Secretary of Transportation adopts a rule, regulation, order, or standard covering the subject matter of the state regulation. Second, a state may regulate railroad safety even more stringently than federal regulation where it is necessary to eliminate or alleviate an essentially local safety hazard.

The Secretary of Transportation has not adopted a rule, regulation, order, or standard expressly covering the subject of walkways alongside tracks. The Circuit Courts have, however, dealt with this question in various manners.

B. The Ninth Circuit Decision

The first Circuit Court to consider walkways was the Ninth. *Southern Pacific Railroad Co. v. Public Utility Comm'n of Calif.*, 820 F.2d 1111 (9th Cir. 1987) (Appendix G, p. 64a). The court affirmed, per curiam, the well-reasoned analysis of the district court in *Southern Pacific Railroad Co. v. Public Utility Comm'n of Calif., 647 F.Supp. 1220 (N.D. Calif. Nov. 3, 1986)* (Appendix F, p. 51a). The court held that under the unambiguous terms of FRSA § 434, walkways were an important safety issue which the appropriate federal agency had not addressed. Thus, the State of California could regulate. The California rule requires proper walkways on all tracks where workers may be on the ground performing operations associated with the track.

C. The Fifth Circuit Decision

Shortly thereafter, the Fifth Circuit specifically rejected the Ninth Circuit's preemption analysis in this case concerning the Texas walkway regulation which only requires walkways in railyards and adjacent switching areas. *Missouri Pacific Railroad Co. et al. v. Railroad Commission of Texas, 833* F.2d *570* (5th Cir. 1987) (Appendix E, p. 37a). ("MOPAC I") The court characterized the Ninth Circuit's reasoning as "overly simplistic", and imposed a novel "practical", factual test to determine preemption of walkways. *Id.* at *575-576.* Under this test, the court, finding conflicting summary judgment evidence, remanded the case for a factual determination of whether the walkways rule would cause enlargement or strengthening of the track structure or otherwise interfere with other matters covered by other federal rules. *Id.* The court found neither express preemption by federal action on walkways, nor negative preemption by deliberate federal inaction.

Since the court found that the lower court had improvidently granted summary judgment on conflicting affidavits, appeal at that time was inappropriate.

The district court, following the analysis in MOPAC I, found preemption. The Fifth Circuit, in the case at bar, reaffirmed its previous decision and affirmed the lower court, finding that its view of the evidence was not clearly erroneous. *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 948 F.2d 179 (5th Cir. 1991) (Appendix A, p. 1a) ("MOPAC II").

D. The Sixth Circuit Decision

Sandwiched between MOPAC I and MOPAC II is the Sixth Circuit's holding. *Norfolk & Western Railway Company v. Public Utilities Commission of Ohio*, 926 F.2d 567 (6th Cir. 1991) (decided February 27, 1991). That case dealt with a distinct, but related issue -- walkways on railway bridges and trestles. There, the court found negative preemption by the Federal Railroad Administration's ("FRA") failure to affirmatively exercise its full authority regarding bridge walkways. *Id.* at 571. The Sixth Circuit relied, in part, on FRA statements which both the Ninth and the Fifth Circuits had rejected as showing negative preemption. *See Id.* at 570-571; MOPAC I at 575-576; *Southern Pacific*, 647 F.Supp. at 1223-1224.

These conflicts among the circuits, interpreting preemption on the same or related subjects, under the same statute, should be resolved. The issue of worker safety is nationwide in scope. Some state walkway rules are enforceable by federal decree; others, such as the Texas rule, are enjoined by federal order.

II.

THE HISTORY OF SECTION 434 OF THE FEDERAL RAILROAD SAFETY ACT ESTABLISHES CONGRESS'S INTENT TO CREATE A PARTNERSHIP BETWEEN FEDERAL AND STATE LAWMAKERS, IN THE PURSUIT OF RAIL SAFETY.

Section 434 of the FRSA begins with a general statement of intent to promote nationally uniform laws and standards relating to railroad safety "to the extent practicable." However, the statute goes on, in a much more specific way, to direct that states shall retain the power to regulate areas of rail safety "[u]ntil such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The language of § 434 could not be more clear regarding its intent to allow continued state involvement in the regulation of railroad safety. Indeed, the drafters' desire for national uniformity of safety laws was modified with the words "to the extent practicable," removing any doubt that the primary purpose of the FRSA was railroad safety. To read § 434's general goal of uniformity as determinative of whether a subject matter has been covered by a federal regulation, is a misinterpretation of the clear language of § 434. As such it amounts to an usurpation of the FRSA's specific goal of railroad safety by replacing it with a general desire for uniformity. The Fifth Circuit committed just such a mistake in the pending case.

As noted above, the decisions in the Fifth Circuit (Appendices A, E) when compared with the Ninth Circuit case of *Southern Pacific Transp. v. Public Utilities Comm'n*, 647 F.Supp. 1220 (N.D.Cal. 1986), *aff'd.*, 820 F.2d 1111 (9th Cir. 1987) (*per curiam*), (Appendices F, G) evidence the current split in the interpretation and application of § 434

of the FRSA. These cases also show the need for Supreme Court review to establish the appropriate inquiry for determining when the FRA may be found to have adopted a rule, regulation, order, or standard covering a particular "subject matter."[1] Such a determination is necessary to avoid costly and time consuming litigation on a case by case basis, and to assure the uniform application of § 434 nationwide. Under the FRSA, Congress specifically intended that states have the ability to regulate, within their borders, the gaps in coverage which are inherent in a nationalized regulatory scheme.

A. Congress Intended That States Have Authority To Regulate Railroad Safety Subsequent To The Passage Of The FRSA.

The language of the FRSA, its legislative history, and court decisions interpreting it, make it clear that Congress, in enacting the statute did not intend to displace state rail safety regulations absent specific federal regulatory authority.[2] The FRSA provides, *inter alia* that the Secretary of Transportation shall have jurisdiction over all areas of railroad safety. Along with the broad authority delegated to the Secretary, Congress specifically authorized

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[1] Another case holding that walkways are not preempted is *Illinois Cent. Gulf R.R. v. Tennessee Pub. Serv. Comm'n.*, 736 S.W.2d 112 (Tenn.Ct.App. 1987) (state walkway regulations not preempted by FRSA). *But see, Norfolk & Western Railway v. Public Utilities Commission of Ohio*, 727 F.Supp. 367 (S.D. Ohio 1990), *aff'd.*, 926 F.2d 567 (6th Cir. 1991) (state walkways preempted because of negative preemption); *Black v. Seaboard System R.R.*, 487 N.E.2d, 468 (Ind.Ct.App. 1986) (state standard for construction and maintenance of walkways preempted by FRSA); *Black v. Baltimore & Ohio R.R.*, 398 N.E.2d 1361 (Ind.Ct.App. 1980) (allegations of muddy conditions in areas adjacent to track based upon state law claims preempted by FRSA).

[2] *See Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926).

state regulation of railroad safety. The FRSA, 45 U.S.C. § 434 provides that:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with an Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. (underlining added).

The genesis of the FRSA was in 1968 with the introduction of H.R. 16980, a bill drafted by the Secretary of Transportation. (*See Hearings on H.R. 16980 Before the House Committee on Interstate and Foreign Commerce*, 90th Cong. 2d Sess. 1-6, Serial No. 90-39 (1968)). Section 4 of that bill would have eliminated all state laws after two years, with the exception of four separate areas. No further action was taken by Congress in the 90th Congress.

On April 18, 1969, the Secretary of Transportation created a 'Task Force on railroad safety comprised of representatives from the Federal Railroad Administration, the state regulatory commissions, the railroads, and the railroad unions. The Report of the Task Force was submitted to the Secretary on June 30, 1969. On the preemption issue the Report provided that "[e]xisting State

rail safety statutes and regulations remain in full force until and unless preempted by Federal regulation." Subsequent to the Report the interested parties together attempted to draft a proposed bill for Congressional consideration in the 91st Congress. Regarding preemption, the bill drafted by the Federal Railroad Administration was not acceptable to either labor or state commissions. Even in the section-by-section analysis of the Administration's bill by the Secretary, which was introduced as S. 3061 and H.R. 14417, the Secretary recognized that the states would not be preempted"...unless the Secretary prescribed federal safety standards covering the subject matter of the particular state or local safety requirements..." (underlining added).

The preemptive language of S. 3061 and H.R. 14417 as introduced provided:

> "SEC. 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rules, regulations, or standards covering the subject matter of the State or local laws, regulations or standards."

Section 5 above was revised and incorporated into the compromise legislation reported by both Senate and House Committees, and ultimately passed by Congress in S. 1933. In testifying on the proposed bills, then Secretary of Transportation Volpe discussed S. 1933 as passed by the Senate and pointed out the areas of permissible state jurisdiction over railroad safety. The relevant portion of the testimony states:

> To avoid a lapse in regulation, Federal or State, after a Federal safety bill has been passed, section 105 provides that the states

> may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the Federal statute....(underlining added)

Hearings Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, and H.R. 14478 (and similar bills), S. 1933, 91st Cong., 2d Sess., Ser. No. 91-51, p. 29 (1970).[3] Rep. Jake Pickle testified as follows:

> Contrary to some speculation that this version of the Railroad Safety Act cuts across State jurisdictions, the States can still take action in three methods. First, the State can continue and initiate legislation in areas of safety not covered by Federal regulations....As an important adjunct, for the first time, the States are clearly given the power to initiate legislation in areas which have not been touched by these [federal] regulations and these State legislative efforts will remain in

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[3]Section 105 of the Senate bill S. 1933, as reported, and section 205 of the House bill, as reported, are incorporated into 45 U.S.C. § 434.

> effect unless and until such time that the Federal Government institutes its own regulations. This is an important advance and recognition of State governments. (underlining added).

116 Cong. Rec. 27613 (August 6, 1970).

The Senate Report provided further support for the authority of the state to regulate railroad safety:

> ...this section [105] preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter. (underlining added).

S. Rep. No. 91-619, 91st Cong., 1st Sess. pp. 8-9 (1969).

The House Report stated:

> Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable. It provides, however, that until the Secretary acts with respect to a particular subject matter, a State may continue to regulate in that area. Once the Secretary has prescribed a uniform national standard the State would no longer have authority to establish Statewide standards with respect to rail safety. (underlining added).

H.R. Rep. No. 91-114, 91st Cong., 1st Sess. p. 19 (1970).

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in 45 U.S.C. § 434 was a counterweighing concern to its desire for national uniformity. See House Report No. 91-114, U.S. Code Cong. and Admin. News, 91st Cong. (1970) p. 4116 (hereinafter "House Report"): "[Section 205] provides, however, that until the Secretary acts with respect to a particular subject matter, a State may continue to regulate in that area." As stated in Senate Report No. 91-619, U.S. Code Cong. and Admin. News, 91st Cong. (1969) pp. 8-9 (hereinafter "Senate Report"):

> On the other hand, the committee recognizes the State concern for railroad safety in some areas. Accordingly, this section preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter.

B. The Primary Purpose Of The FRSA Is To Promote Safety In All Areas Of Railroad Operations.

Congress's paramount concern for safety was the reason it enacted the FRSA. House Report, U.S. Code Cong. and Admin. News, pp. 4105-4108; Senate Report, pp. 1-5. Consequently, Congress did not authorize the Federal Railroad Administration to preempt state railroad safety regulations unless there were federal regulations on the same subject matter as the state regulations.

This Court has repeatedly refused to void state statutes or regulations, absent congressional intent to preempt them.

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation to do so. The exercise of federal supremacy is not lightly to be presumed.

New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203, (1952). *See also, Pacific Gas and Electric v. State Energy Resources Conservation and Development Commission*, 416 U.S. 190, 206 (1983). The Court is especially reluctant to strike down state regulations when it would leave citizens unprotected while waiting for federal action. *See Hillsborough County, Florida v. Auto Med. Labs*, 471 U.S. 707, 105 S.Ct. 2371, 2376 (1985); *Kelly v. Washington*, 302 U.S. 1, 14-15 (1937). Any doubts as to whether federal regulation of a particular subject matter is the same as state regulation should be resolved in favor of the states. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 487-488 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1686 (1985). Where, as here, a state's police power is involved, federal preemption is not to be presumed. *Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2d Cir. 1969); *Chrysler Corp. v. Rhodes*, 416 F.2d 319, 324 n. 8 (lst Cir. 1969).

Statutes regulating the subject matter of walkways, as involved in the Fifth and Ninth Circuit cases discussed herein, address the safety concerns of those who work near railroad tracks in yards. Federal regulations do not require safe walkways. Regarding issues of rail safety, Congress has clearly stated that states may regulate until the federal

government has adopted a standard covering the subject matter of the State requirement. Congress has "unmistakably ordained" that states can regulate rail safety. *See Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

As Congress has explicitly provided for state regulations of railroad safety in certain circumstances, it cannot be argued that the nature of the regulated subject matter mandates federal preemption of state railroad safety regulations. Only where FRA has enacted a regulation covering the same subject matter as the state regulation are both the necessary clear manifestation of congressional preemptive intent and the irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation. 45 U.S.C. § 434; *N.Y.S. Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul, supra*.

Section 434 of the FRSA evidences a two part test for establishing when states can regulate for rail safety without failing as preempted. The states can regulate:

> (1) Where the Secretary of Transportation has not yet adopted a rule, regulation, order, or standard covering the subject matter of the State requirement; and,
>
> (2) Where the Secretary has promulgated a rule, regulation, order or standard covering the same subject matter as the State requirement and the State regulation:
>
> > a) is necessary to eliminate or reduce an essentially local safety hazard, and
> >
> > b) is not incompatible with any federal provision, and

c) does not create an undue burden on interstate commerce.

See, Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

III.

THE NINTH AND FIFTH CIRCUITS HAVE RENDERED DECISIONS WHICH ESTABLISH CONFLICTING APPROACHES TO THE APPLICATION AND INTERPRETATION OF § 434 OF THE FRSA.

A. The Ninth Circuit Has Concluded That State and Federal Regulations Cannot be Held to Cover the Same Subject Matter Unless They Address the Same Safety Concerns.

Courts that have interpreted the preemption language of 45 U.S.C. § 434 are in conflict concerning whether the federal regulation must cover the same specific subject matter before preemption of any state regulation is found.

The Ninth circuit, addressed the issue of federal preemption of a state regulation which *inter alia*, required railroads to provide walkways on each side of their tracks, in *Southern Pacific Transp. v. Public Utilities Comm'n*, 647 F.Supp. 1220 (N.D. Cal. 1986), *aff'd.*, 820 F.2d 1111 (9th Cir. 1987) (*per curiam*) (Appendices F, G). That Court addressed the question of whether federal regulations relating to track support structure, also covered the subject matter of walkways.

The railroad had advanced several arguments in that case in support of its contention that the California walkway rule was preempted. The most important of which, for purposes of comparison with the Fifth Circuit decision, was the railroad's suggestion that the FRA's existing track regulations covered the same subject matter as the walkway regulation proposed by the California legislature. The railroad, citing the FRA's track safety regulations, noted that the FRA regulations established standards governing the subgrade and ballast on which the tracks were laid. *Id.* at 1224. The railroad submitted evidence that the state requirements of a walkway would require an extension of the ballast or subgrade, and as such should be preempted. *Id.* The railroad suggested to the court that because the state and federal regulations affect the same area of railroad operations, then they cover the same subject matter under § 434, and thus the state regulations should have been preempted. *Id.* at 1225.

Judge William Schwarzer, referring to the legislative history of the FRSA pointed out that,

> [T]he legislative history of the FRSA indicates that Congress's primary purpose in enacting that statute was "to promote safety in all areas of railroad operations." H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4104 [cited as House Report]; see also 45 U.S.C.A. §421 (West 1972). Congress's concern extended to the safety of employees engaged in railroad operation. House Report at 4106. Read in light of that history, § 434 manifests an intent to avoid gaps in safety regulations by allowing state regulation until federal standards are adopted. State and federal regulations therefore cannot be held to cover the

> same subject matter unless they address the same safety concerns.

Id. The court went on to note that "[t]he ballast regulations relied upon by [Southern Pacific] are designed to insure that tracks have adequate support," and that "[t]he regulations dealing with vegetation on or near roadbeds are designed to insure that employees can perform necessary maintenance work. *See* 49 C.F.R. § 213.37 (1985)." *Id.* The court concluded that "[n]o FRA regulation addresses the concern that employees have a safe working environment near railroad tracks." *Id.*

The court supported its reading of the §434 preemption exception, with *National Association of Regulatory Commissioners v. Coleman*, 542 F. 2d 11 (3rd Cir. 1976). There, the Third Circuit held that only the precise subject matter of the FRA regulations, monthly accident reporting requirements, was beyond a state's regulatory authority. The Third Circuit concluded, however, that FRA regulation of monthly accident reporting requirements would not preclude states from 1) requiring immediate notification of rail accidents, or 2) being furnished with copies of monthly FRA reports. *Id.* at 15.

Thus, the Ninth Circuit's view of preemption denies regulation by the state only if the precise safety concern is covered. That a state regulation may have physical proximity to an area covered by a federal regulation is not sufficient to deny state action.

B. <u>The Fifth Circuit Has Concluded That If A State Regulation Has the Effect Of Regulating A Subject Matter Which "Functionally Overlaps" A Subject Matter Covered By FRA Regulations, The State Regulation Does Not Foster National Rail</u>

Safety Standards To The Extent Practicable And Is Preempted.

The decisions in MOPAC I and MOPAC II represent the current preemption law in the Fifth Circuit. The MOPAC I court, addressing precisely the same matter of state walkway requirements at issue in *Southern Pacific*, specifically rejected the approach used by the *Southern Pacific* court, concluding that it was "overly simplistic." 833 F. 2d at 574. The Fifth Circuit began its discussion citing the holding of *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, that "[e]ven if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a federal statute," and that "[t]he test of whether both federal and state regulations may operate...is whether both regulations can be enforced without impairing the superintendence of the field, not whether they are aimed at similar or different objectives." 833 F.2d at 573.

The Fifth Circuit expressed concern that "[i]f the purpose of the state regulation was alone controlling, a state could enact a walkway requirement or other safety regulation that hindered or prevented a railroad from complying simultaneously with an FRA regulation designed to enhance safety in a different area". The court went on to note that "[f]ederal superintendence of the field would be thwarted by such a mincing construction of whether FRA regulations 'cover the subject matter.'" *Id.* at 574.

The MOPAC court, repeatedly relied on the introductory language of § 434, directing the establishment of uniform national rail safety standards to the extent practicable, and concluded that "[i]t would be impracticable and inconsistent with this intent, if, assuming walkways are integrally related to track structure and composition, 50 states could establish individual walkway regulations in addition to the FRA standards." *Id.* The Fifth Circuit,

indicated in *MOPAC I* that it was guided primarily by concerns for uniformity of regulations, unlike the Ninth Circuit, which was guided primarily by concerns for safety. The MOPAC court so held despite that FRSA expressly sanctions different state approaches until the FRA steps in.

This Fifth Circuit concern for uniformity had earlier been voiced in *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973). There, the court interpreted § 434 and concluded that "[t]he ultimate goal of the Act is to establish nationally uniform control of railroad safety." The court added that the exceptions in § 434 provided only a "narrow spectrum of deviation from national uniformity...." This holding foreshadowed the Fifth Circuit's failure, in the case at bar, to give weight to the States' ability to act until the FRA takes action.

Employing a "practical" approach, and with an eye toward federal uniformity of railroad safety laws, the MOPAC court addressed whether walkways were a subject matter that was covered by federal regulations. The court reasoned that "[i]f the [state] walkway regulation has [the effect of requiring the railroad to strengthen or enlarge the roadbed beyond the FRA requirements], we hold that the federal regulation has 'covered the subject matter' of track composition and design and that the state regulation conflicts with § 434's purpose to foster national rail safety standards 'to the extent practicable.'" *Id.* The Fifth Circuit, in a footnote distinguished between "a functionally overlapping state regulation and one not 'covered by the subject matter' of an FRA regulation." *Id.* The court suggested that the FRA may be found to have adopted a regulation covering a subject wherever it is found, after investigation, that a state regulation functionally overlaps some object or aspect of railroad safety covered by an FRA regulation. The Fifth Circuit proceeded to remand the issue of state requirement of walkways, for a factual determination to establish whether both state and federal

regulations could be enforced without impairing the superintendence of the field.

The Fifth Circuit's reference to functional overlap in its search for a practical approach to the question of whether a statute "covers the subject matter" raises more questions than it answers, and ultimately places national uniformity ahead of the FRSA goal of rail safety and Congress's intent that States have continued involvement.

C. The Fifth Circuit Interpretation of § 434 Directly Contradicts Congressional Intent And The Plain Meaning Of That Section.

The Fifth Circuit's approach to determining whether the federal regulation has 'covered the subject mater' of the state regulation is overly broad in its application of the doctrine of preemption in § 434. The Fifth Circuit approach does not permit state regulations to be promulgated pursuant to § 434 in instances where the federal agency has not regulated the same subject matter. Under the FRSA, state regulations are co-equal with other federal regulations when the state regulation covers an area where the federal authorities have not actually adopted a regulation. The state is, in essence, regulating for the federal government until the federal agency does so. If, for example, two federal regulations had a potential, "practical" impact on one another, an independent factual inquiry would not be required. Well-established rules of statutory construction would require that the rules be interpreted so as not to conflict.

Indeed, it is undisputed that the FRA could promulgate a walkway requirement. Such a rule could not have more or less practical impact on the other existing federal rules than a state regulation. But, evidencing a paralysis of unknown origin, that agency has refused to ever formally act on this subject. The FRA's inaction has

created a void in federal safety rules which the States, under FRSA, should be permitted to fill.

Finally, the Fifth Circuit analysis ignores the plain meaning of § 434 by allowing the general desire for national uniformity to determine the boundaries of state regulation. The Fifth Circuit's "functional overlap" test suggests that the subject matter of a federal regulation be defined, after the fact, by comparing the physical proximity of an object or area of federal regulation to the object or area the state seeks to regulate. This creates an elusive standard. States might be prevented from regulating safety of railroad operations within their borders based only on the physical location of the object that they seek to regulate. Such a result completely contradicts the purposes of the FRSA goal to promote rail safety and § 434's explicit inclusion of state regulation in furtherance thereof.

As stated by the Ninth Circuit, until the FRA has regulated a subject matter, states are not preempted from doing so. The Fifth Circuit's "functional overlap" test raises more questions than it answers regarding the application of § 434, and it allows the preemption of any state safety regulation for the sake of uniformity in contradiction of the purposes of the FRSA.

CONCLUSION

Review by this Court is necessary to resolve the conflict among the circuit courts on the issue of preemption of state-enacted railroad walkway regulations. In addition, the Fifth Circuit's ruling in the instant case, overly emphasizes national uniformity of regulation at the expense of the FRSA's primary goal of rail safety.

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